

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLEE**

77-1319

To be argued by
MINNA SCHRAG

United States Court of Appeals
FOR THE SECOND CIRCUIT

Docket No. 77-1319

UNITED STATES OF AMERICA,

Appellee,

—v.—

NANCY REED and MORRIS GOLDSMITH,
a/k/a "MARLOWE,"

Defendants-Appellants.

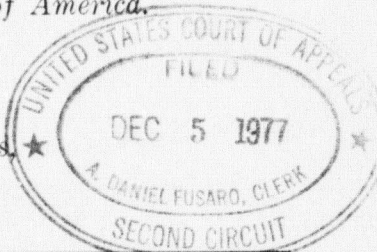
ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

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COUNTY OF NEW YORK) ss.:

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Gladys D. D'Angelo



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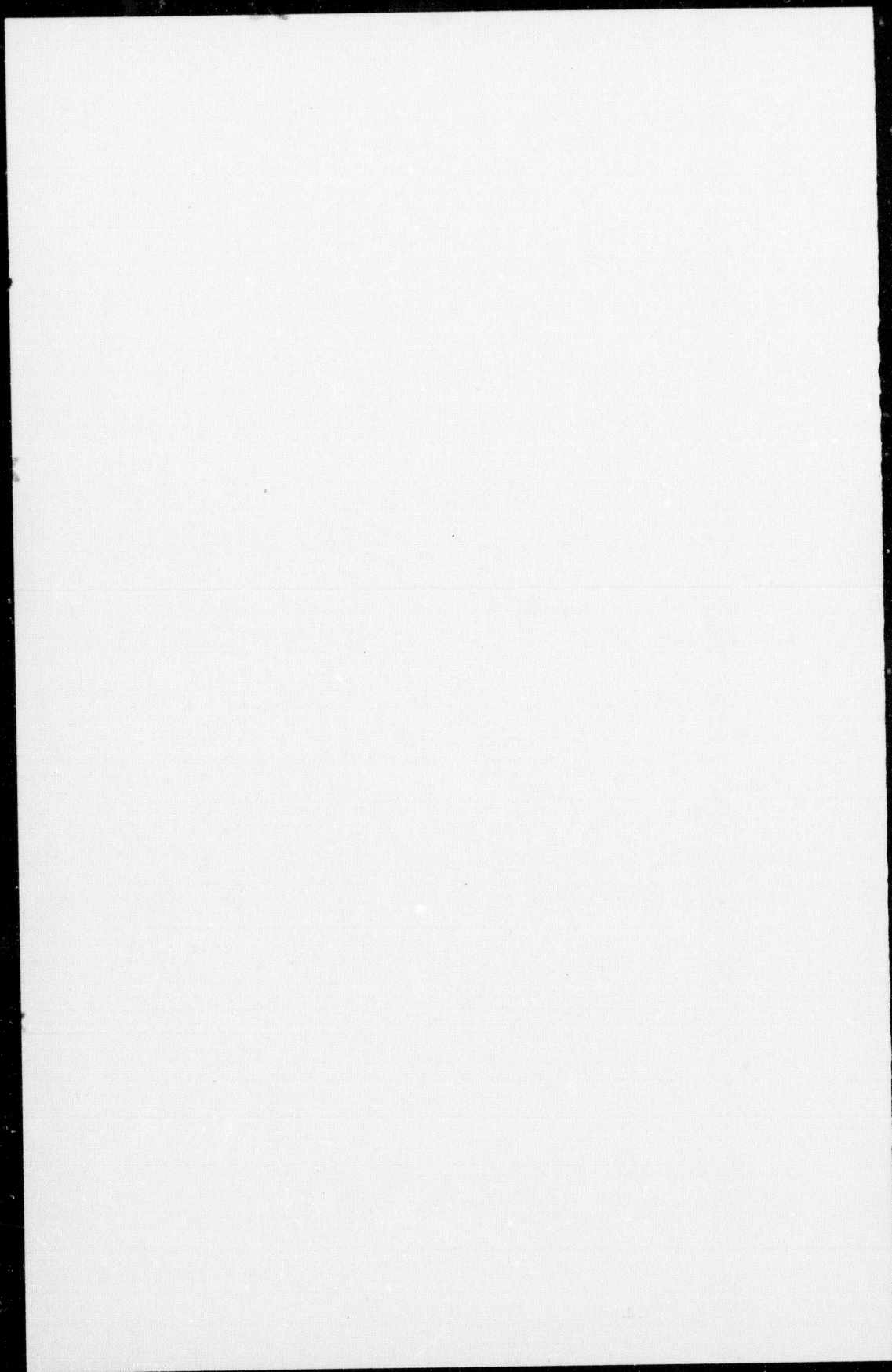
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NANCY REED and MORRIS GOLDSMITH,
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Defendants-Appellants.

BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

Nancy Reed and Morris Goldsmith, a/k/a "Marlowe," appeal from judgments of conviction entered on July 20, 1977, in the United States District Court for the Southern District of New York, after a six-day trial before the Honorable Frederick van Pelt Bryan, United States District Judge, and a jury.

Indictment 77 Cr. 273, a four-count indictment filed on April 14, 1977, charged Reed and Goldsmith in Count One with conspiracy to distribute, and to possess with intent to distribute, heroin in violation of Title 21, United States Code, Section 846. Count Two charged Reed and Goldsmith with distributing and possessing with intent to distribute 122.65 grams of heroin on September 10, 1976, in violation of Title 21, United States Code, Sections 812, 841(a)(1) and 841(b)(1)(B). Counts Three and Four, respectively, charged both defendants with violating the same provisions by distributing and possess-

ing with intent to distribute 95.34 grams of heroin on September 23, 1976 and 125.18 grams of heroin on September 30, 1976.

Following a day-long hearing that primarily concerned the whereabouts of the confidential informant and the voluntariness of post-arrest statements made by Goldsmith, trial commenced on June 8, 1977. On June 15, 1977, after eight hours of deliberations, the jury returned a verdict of guilty as to both defendants on Counts One and Two. The jury had not yet reached a verdict on Counts Three and Four, but without permitting further deliberations or delivering an *Allen* charge, the court declared a mistrial as to these counts. (Tr. 711-14).*

On July 20, 1977, Judge Bryan sentenced Reed on Counts One and Two to concurrent terms of six years' imprisonment; execution of sentence was suspended and the defendant was placed on probation for a period of five years. The court sentenced Goldsmith on Counts One and Two to concurrent terms of four years' imprisonment, to be followed by three years' special parole.

Statement of Facts

The Government's Case

A. Synopsis

The Government's proof at trial established that on three separate occasions Reed and Goldsmith sold one-eighth kilogram quantities of heroin to Drug Enforcement Administration ("DEA") Agent Garfield Ham-

* "Tr." refers to the trial transcript; "H." refers to the hearing transcript of June 7, 1977; "Br." refers to the appellate brief of the designated appellant.

monds, Jr., who was acting in an undercover capacity and that they negotiated with Agent Hammonds for the sale of even larger quantities of heroin. The evidence was presented through the testimony of Agent Hammonds and of DEA Agents Dwight S. Rabb, Richard Bell and Harvey Tuerack.

B. Agent Rabb's Meeting with Reed and Goldsmith at the Blue Book Lounge

Agent Rabb testified that on or about August 23, 1976, Adeliouis McCray, a paid confidential informant for the DEA, introduced him to Reed and Goldsmith at the Blue Book Lounge in Manhattan. McCray said that Agent Rabb was a friend from Virginia "who had come to cop," meaning to purchase narcotics. Agent Rabb then had a conversation with Reed and Goldsmith about a bar that he said he owned in Newport News. McCray and Reed spoke privately. Thereafter, Rabb told Reed that he was going back to his hotel room and she should contact McCray "if anything should come through." (Tr. 23-27).

C. The September 10 Transaction

Agent Hammonds testified that on the evening of September 9, 1976, McCray gave him a sample of heroin. (Tr. 35; GX 7). Shortly thereafter, McCray drove Hammonds to 1380 University Avenue in the Bronx, Reed's residence, where the informant introduced Hammonds to Goldsmith on the street. Goldsmith was introduced as "Marlowe." (Tr. 36-37).

Goldsmith told Hammonds that Reed was upstairs getting ready to get "the package" for Hammonds and McCray. Hammonds offered to buy an eighth kilogram of heroin. Goldsmith said that he would have to advance

\$6,500 to Reed for drugs that should "take a nine cut." Reed arrived and told Hammonds that she would need the money to pick up the package. Hammonds gave her \$6,500. Reed asked how Hammonds liked the sample from McCray and told him that the package would be of the same quality. Reed departed, heading towards 170th Street, while Goldsmith entered the building. (Tr. 37-40).

Around midnight, Hammonds sent McCray to make a telephone call. While McCray was thus occupied, Goldsmith appeared and delivered approximately one-eighth kilogram of heroin to Hammonds, telling him that the package was a little overweight and that the quality should be good. (Tr. 41-45; GX 2).

D. The September 23 Transaction

On September 23, McCray called Reed at her apartment and told her that Hammonds "wanted to get another thing." Reed said he should call back in 15 minutes, since "Marlowe was not there." About 15 minutes later, McCray called Goldsmith, who said that he had already set everything up. Goldsmith quoted a price of \$5,750 for an eighth kilogram of heroin. (Tr. 46-47).

Sometime later that evening Hammonds and McCray met Reed and Goldsmith outside of 1380 University Avenue. Goldsmith said that he needed a little time to "get the package together." The four later met at the New Bridge Bar in the Bronx. Reed, speaking with Hammonds out of the presence of McCray and Goldsmith, explained that the price quoted by Goldsmith was the "wrong price" since it did not include a fee for her services and expenses. After brief negotiations, Hammonds and Reed agreed on a price of \$6300. Hammonds and Reed walked out of the bar and agreed to conduct their future deals together without Goldsmith. Ham-

monds gave Reed \$6300, and they reentered the bar. Reed and Goldsmith then departed. (Tr. 47-51). They were followed by surveillance agents, including Agent Bell.

After visiting a building at 1133 Ogden Avenue in the Bronx, Reed and Goldsmith accompanied an unidentified male to a bar in Manhattan where they stopped briefly before proceeding back uptown to the New Bridge Bar (Tr. 228-31), where Reed and Goldsmith again met with Hammonds and McCray. Reed assured Hammonds that the package was good and placed it in the glove compartment of McCray's car. Hammonds later recovered the package and found that it contained an eighth kilogram of heroin. (Tr. 52-54; GX 3).

E. The September 30 Transaction

On the evening of September 29, Reed and Goldsmith met Hammonds and McCray at the New Bridge Bar where they arranged for a third sale of an eighth kilogram of heroin. During the conversation, Hammonds complained about the poor quality of the heroin he had received on September 23. Reed appeared to be very upset and stated that source of supply had apparently lied to her and Goldsmith. Goldsmith said he would try to get some of the money back or some more narcotics (T. 55-56). Reed told Hammonds that she had a white connection in New Jersey named Paul Levy who could supply her with a very good quality kilogram. She said that she knew Levy was reliable because she had introduced her cousin "P.T." from Washington, D.C., to Levy and P.T. had been very satisfied with the two kilograms of heroin he had subsequently purchased from Levy. She suggested that Hammonds call her in October to arrange for the purchase of a kilogram of heroin that would "take 15 to 18 cuts." (Tr. 56-61). Hammonds then gave \$6500 to Reed for that evening's purchase. Reed said that the

package "should be of fairly reasonable quality" since it was coming from the same source as the first eighth kilogram. Reed and Goldsmith then left. (Tr. 61-62). They were followed by Agent Bell, who testified that Reed and Goldsmith proceeded into Manhattan followed by a green Pontiac registered to one James Crowley and that Goldsmith spoke with the driver of the Pontiac. (Tr. 232-35).

At about midnight, Reed and Goldsmith returned to the New Bridge Bar. Goldsmith handed Hammonds a package containing an eighth kilogram of heroin and told him that it was not of the quality that he wanted Hammonds to have, but that he "could work with" it. He then stated that Reed had a white source that had good quality heroin and that he would try to get some for him. As Reed said good-bye to Hammonds that night, she told him that she would hook him up with her guy Paulie. (Tr. 62-64, 70-73; GX 4).

F. The Negotiations for Large Quantities of Heroin from Paul Levy and James Crowley

On October 6, Hammonds met Reed on the street in front of her building and discussed the proposed kilogram purchase. Reed said that she had spoken with Levy and that he would sell him a kilogram of heroin that "would take a 12" for \$100,000. She also said that the source absolutely refused to meet with Hammonds personally and again vouched for his reliability. She added that Levy at one time wanted to buy her a home in New Jersey and set her up in business. (Tr. 73-76).

On October 10 and November 28, Hammonds telephoned Reed and discussed the proposed transaction. Each used a veiled terminology common to narcotics traffickers. Hammonds recorded these telephone conversations and the tapes were admitted into evidence and played for the jury. (Tr. 76-94; GX 10-13).

On November 28, Hammonds met Reed in front of her building. Reed told him that he would have to "front" the \$100,000 for the kilogram deal. Hammonds replied that he could not advance that much money. Reed then told Hammonds that through a source named Crowley she could furnish a pound of five-cut heroin for \$36,000. Hammonds told her to forget about the kilogram deal, but that he would call her back with regard to the pound. (Tr. 99-101).

The following day, Hammonds placed a telephone call to Reed and discussed their pending narcotics negotiations. The tape recording of that conversation was also admitted into evidence and played for the jury. (Tr. 101-06; GX 10, 14). After that telephone call, Hammonds and McCray met with Reed and Goldsmith outside of Reed's building. Reed again advised Hammonds that Levy would not meet with him under any circumstances and that the \$100,000 would have to be fronted. Hammonds told her to "just forget about it." (Tr. 106-07).

Goldsmith then said that he had a source of supply named Crowley who could furnish Hammonds with heroin that would "take a fifteen cut." Reed added that she had seen it being "checked out" and that it was "on the money." Hammonds gave Goldsmith \$500 in advance payment for a sample from Crowley. (Tr. 106-09).

Hammonds then asked Goldsmith if he knew anybody who wanted mannite, a material used to dilute narcotics. Reed said that her cousin, P.T., was looking for some not long ago and that she would introduce Hammonds to him. (Tr. 109).

Finally, on December 6, Hammonds and McCray went to Reed's apartment, where, in the presence of her fifteen year old daughter, Reed produced a sample that she said came from Crowley. She told Hammonds "to check it out." (Tr. 109-11; GX 5).

G. Reed's Arrest and Confession

On February 23, 1977, Reed and Goldsmith were arrested at Reed's apartment by Agents Bell, Tuerack and Jordison. Bell identified himself to Reed and advised her of her constitutional rights pursuant to a DEA form. Reed said "there must be some mistake." Bell then seized two address books which he saw near the telephone after Reed acknowledged that one was hers.* (Tr. 236-40).

Bell then transported Reed to the New York Regional Offices of the DEA. During that time, Bell explained the arraignment process in general terms. (Tr. 249-50).

At the DEA Office, Reed furnished certain personal history information to Bell. He again advised her of her constitutional rights pursuant to the DEA form. (GX 16). Reed again denied knowing anything about the narcotics. (Tr. 250-53; 365-66).

At that point, Hammonds entered the room. Reed immediately said that she did not know what she was doing there because she was not the "source of supply." She admitted that she had sold heroin to Hammonds on three occasions and that the first and third packages had come from Crowley, while the second came from Little Billy. She identified Crowley and Little Billy as associates of Goldsmith and stated that she knew Paul Levy, a dealer of high quality heroin. She further admitted that she had connected her cousin, P.T., with Levy, and that he had purchased at least two kilograms from Levy.

* The address books were admitted into evidence solely against Reed. (Tr. 284-85; GX 6-7). Government's Exhibit 6 contains entries with telephone numbers for: "PT", with an address in Hyattsville, Md.; "Paulie"; and "James Crowley". Entries including "Paulie" and "P.T." are to be found in Government's Exhibit 7.

Reed also said that P.T. had not paid Levy on time or "messed up the money" and that, as a result, Levy had "given her static" about Hammonds. Additionally, she admitted knowing other "small dealers" in the area. (Tr. 113-21, 253-55, 366-67).

Bell and Tuerack transported Reed to the United States Attorney's Office where she was interviewed by then Assistant United States Attorney Howard Sussman. Sussman again advised her of her constitutional rights pursuant to a form. Reed executed a written confession with respect to her narcotics dealings with Hammonds. (Tr. 370-75; GX 8).

H. Goldsmith's Arrest and Confession

Agents Tuerack and Jordison participated in the arrest of Goldsmith. Tuerack awakened Goldsmith and told him that he was under arrest for violations of the federal narcotics laws. Jordison then advised Goldsmith of his constitutional rights pursuant to a DEA form. Goldsmith responded that he understood those rights and that there must be a mistake. (Tr. 360-62; GX 17).

Tuerack and Jordison then transported Goldsmith to the DEA office. While in the car, Goldsmith again declared that there must be a mistake. After Goldsmith's processing, Tuerack questioned him about the narcotics transactions. Goldsmith denied knowing anything about them. (Tr. 363-68).

When he encountered Hammonds, Goldsmith said, "I had bad vibes about you all the time." (Tr. 116-17). He then acknowledged that he had engaged in the three transactions with Hammonds and stated that the second package came from "Little Billy". (Tr. 369-70).

Tuerack and Bell subsequently transported Goldsmith to the United States Attorney's Office where he, like

Reed, was interviewed by Assistant United States Attorney Sussman. Sussman again advised Goldsmith of his constitutional rights pursuant to a form. Goldsmith then executed a written confession with respect to his narcotics dealings with Hammonds. (Tr. 370, 382-92; GX 9).

The Defense Case

Reed first called Helena T. Allen, a co-worker of hers at the Telephone Company. She testified that Reed had a good reputation at work. Allen further testified that she had dated McCray, the informant, and that he was of bad character. On cross-examination, Allen admitted that she did not know Reed's associates in the Bronx. She also stated that she did not know "Billy", Paul Levy or P.T. (Tr. 432-45).

Next, Reed called Thelma Routh to the stand. Routh is Goldsmith's mother and the grandmother of Reed's child. She testified that—contrary to the statements of Agent Bell—the telephone in Reed's apartment was located on the kitchen wall and that there was no telephone table. (Tr. 446-48).

Finally, Reed took the stand in her own behalf. She admittedly engaging in the three narcotics transactions charged in the indictment, but testified that her involvement resulted only from the pressuring of McCray, the informant. She further testified that she had never engaged in any previous narcotics transactions and that McCray had coached her in what to say to Hammonds. She added that McCray had also pressured Goldsmith into becoming involved with Hammonds. (Tr. 451-85).

On cross-examination, Reed testified that Hammonds had lied concerning certain monies that he said she had received. (Tr. 489-92). She also said that contrary to his testimony, she had never suggested that Goldsmith

"be cut out of the picture altogether." (Tr. 493-94). She denied having told Hammonds that he could get a kilogram of heroin from one of her white connections. She further denied ever having introduced Paul Levy to P.T. (Tr. 495-96). Reed admitted knowing Crowley and Little Billy and that the narcotics sold to Hammonds had come from them. (Tr. 498-500). She admitted that Government's Exhibits 6 and 7 were her address books. (Tr. 502-04).

Reed testified that she did not recall talking about the narcotics transactions at the DEA Office after her arrest or with Assistant United States Attorney Sussman. She did admit, however, that she had attempted to give Sussman her "best recollection of what had taken place" and had signed a written confession after she "glanced over it." (Tr. 508-12; GX 8).

Goldsmith presented no evidence.

ARGUMENT

POINT I

The District Court Properly Denied Reed's Motion to Suppress the Telephone Books.

Reed's only claim on appeal is that Judge Bryan erroneously denied her mid-trial motion to suppress the telephone books seized at the time of her arrest. Specifically, she argues that her arrest was effected in violation of her Fourth Amendment rights because it was allegedly a warrantless arrest made "within her home." (Reed Br. 21). In advancing this claim, Reed has constructed an argument that presumes that the agents entered her home and then arrested her. This presumption is unsupported by the record, which reflects, as the District Court twice

stated, that Reed was arrested when she came to her door and before the agents went into the apartment. (Tr. 412, 431). Judge Bryan correctly ruled that, under *United States v. Santana*, 427 U.S. 38 (1976), the arrest was perfectly proper.

A. Reed Waived the Motion to Suppress

Before turning to the merits of this issue, it should be noted at the outset that Reed failed to preserve this issue prior to trial, pursuant to Rule 12(f), F.R.Cr.P. Anticipating this waiver argument, defense counsel contends in a footnote of his brief that his failure to make a pre-trial motion should be excused because he did not know until trial that the Government would introduce the telephone books seized at the time of her arrest. (Reed Br. 21-22). However, the record reflects that defense counsel himself was entirely responsible for his failure to make the appropriate pre-trial motion.

When the defense claimed to be surprised by the Government's offer of the telephone books during the first day of trial, the Assistant United States Attorney responded that the defense attorney had never made any demand for discovery of documentary or physical evidence which the Government intended to use at trial. (Tr. 244). In addition, the Assistant noted that the defendant Reed was herself well aware that the Government had possession of the telephone books, since she had personally retrieved the originals and had been told that the Government had made copies. (Tr. 244, 282). Still maintaining surprise, defense counsel relied on the fact that on the previous day—the day before trial commenced—the Assistant had offered to turn over Rule 16 material if the defense did the same. (Tr. 244-45). Obviously, this offer for reciprocal discovery of documentary or physical evidence made by the Government on the day before trial reveals that it was defense counsel who was remiss in

obtaining the discovery necessary for him to make timely pre-trial motions. Although the trial court generously considered Reed's motion in the middle of the trial, it need not have done so.* Under Rule 12(b) and (f), this Court should deem the suppression motion to have been untimely and waived.**

* Reed cites at length the District Court's statements suggesting that the Assistant United States Attorney was somehow the cause for the defense attorney's lack of preparation. We submit that Judge Bryan unfairly criticized the Assistant and perhaps did not fully note that defense counsel conceded that the reciprocal discovery discussions came only on the day before trial and, even then, only upon the Assistant's offer. Of course, under Rule 16 (a)(1)(C) defense counsel could have obtained inspection of the Government's copies of the telephone books, even apart from the fact that his client had the originals.

** Apart from Reed's failure to raise this issue until after the trial commenced, the argument now made on appeal was never made to the trial court. When the District Court permitted Reed's counsel to explore, mid-trial, the circumstances of the arrest and the seizure of the telephone books, her resulting motion to suppress the evidence was based entirely on the claim that she had not consented to the seizure of the books. (Tr. 277). Later in the trial, defense counsel for both Reed and Goldsmith cross-examined the agents, in the presence of the jury, about the fact that they had effected the arrests of Reed and Goldsmith without arrest warrants. (Tr. 398-99, 411-413). Counsel for Reed did *not* then move to suppress the telephone books as the fruits of an allegedly unlawful arrest. Instead, he requested a probable cause hearing and argued that absent exigent circumstances the agents were required to obtain an arrest warrant and a search warrant. When the District Court responded that there was "no evidence of any search," defense counsel stated, "they took the book." The District Court noted that the plain view doctrine covered that seizure. (Tr. 411-12). At no time did defense counsel for Reed spell out the present claim on appeal, namely, that the allegedly unconstitutional arrest required suppression of the address books. This Court has recently re-emphasized its unwillingness to entertain arguments on appeal which defendants have not specifically presented to the trial court. *United States v. Perez*, Dkt. No. 77-1076, slip op. 6403, 6410-11 (2d Cir., Nov. 11, 1977); *United States v. Fuentes*, Dkt. No. 77-1083, slip op. 5883, 5890 (2d Cir. Sept. 14, 1977); *United*

[Footnote continued on following page]

B. Reed's Arrest Was Effected In a Public Place Under the Holding of Santana.

However, assuming that this Court reaches the merits of Reed's Fourth Amendment claim, we submit that it will find that an elaborate argument has been made on a fundamental misconstruction of the record. In her appellate brief, Reed describes her arrest as one effected without a warrant "in the living room or dining area in front of her teenage daughter," (Reed Br. 31), "in appellant Reed's apartment" (*Id.* at 10), "within her home" (*Id.* at 21), and "while she was inside her own apartment" (*Id.* at 21). These characterizations of the arrest create an impression not supported by the record and not accepted by the District Court.

The arrest was described in the testimony of Agent Tuerack, both during the pretrial hearing and at trial, in the testimony of Agent Bell, who testified on the subject twice during the trial, and in the testimony of Reed. The agents attested that at about 7:45 a.m. on the morning of February 23, 1977, Agents Tuerack, Bell, Jordison and Aponte went to Reed and Goldsmith's apartment at 1380 University Avenue. (H. 99-101; Tr. 236, 360). While Agent Aponte waited downstairs, the other three agents proceeded to the 14th floor. (*Id.*). Reed concurred in Agent Bell's testimony that the officers knocked on the door and correctly identified themselves. (Tr. 236, 275).^{*} Reed also agreed that, as both Agent Bell and Tuerack testified, she responded to their announcement by coming to the door and opening it. (Tr. 237, 275, 360). Reed was

States v. Braunig, 553 F.2d 777 (2d Cir. 1977). That rule should certainly apply here, particularly in light of defense counsel's failure to litigate these claims in advance of trial, as is required by the Federal Rules of Criminal Procedure.

^{*} Agent Bell testified that the agents identified themselves as agents of the United States Government Drug Enforcement Agency. (Tr. 237). Reed recalled that they had identified themselves as the police. (Tr. 275).

then arrested by Agent Bell. (H. 101; Tr. 236, 360).^{*} Agents Tuerack and Jordison proceeded to the bedroom and arrested Goldsmith. (H. 101; Tr. 360).

When defense counsel argued that a warrantless arrest had been improper in these circumstances, the District Court described its view of the event, as follows: "She came to the door and they arrested her. Then they went into the apartment." (Tr. 412). Later, Judge Bryan reiterated that the arrest occurred when Reed appeared in her doorway: "[T]he entry of Miss Reed's [apartment] was admittedly after she was arrested in full view when she opened the door." (Tr. 431).^{**} When the trial judge articulated this well-founded view of the facts, Reed's attorney did not even attempt to dispute it.

The District Court properly upheld the arrest on the authority of *United States v. Watson*, 423 U.S. 411 (1976) and *United States v. Santana*, 427 U.S. 38 (1976). In *Watson*, the Supreme Court held a warrantless arrest in a public place to be constitutional, noting that a long line of Fourth Amendment cases reflected the ancient common law rule that a peace officer need not obtain an arrest warrant in order to effect an arrest based on probable cause. The several Congressional statutes permitting federal officers to arrest without a warrant were, as the Court noted, in consonance with

^{*} Reed attested that after she opened the door the three agents rushed in, two running to the bedroom and one to the kitchen. (Tr. 275). By contrast, Agent Bell, who effected Reed's arrest, swore that after Reed opened the door, they told her they were arresting her and Mr. Goldsmith. (Tr. 236). Similarly, Agent Tuerack testified that after the door to the apartment opened, Agent Bell started talking to Reed and advised her that she was under arrest. (H. 101). The District Court was entitled to credit Bell's and Tuerack's versions and to reject Reed's story, which implausibly describes all the agents leaving her unguarded at the open door at the very moment that they were arresting her.

^{**} The trial transcript contains the word "partner" where "apartment" is obviously appropriate.

the rule prevalent throughout the United States and presumed to be constitutional.* The opinion of the Court stated that the "necessary inquiry, therefore, was not whether there was a warrant or whether there was time to get one, but whether there was probable cause for the arrest." *United States v. Watson*, *supra* at 417.**

* Judge Bryan specifically noted that Drug Enforcement Agents were empowered under 21 U.S.C. § 878 to arrest without a warrant. (Tr. 431). That statute provides as follows.

§ 878. Powers of enforcement personnel.

Any officer or employee of the Bureau of Narcotics and Dangerous Drugs designated by the Attorney General may—

* * *

(3) make arrests without warrant (A) for any offense against the United States committed in his presence, or (B) for any felony, cognizable under the laws of the United States, if he has probable cause to believe that the person to be arrested has committed or is committing a felony;

* * *

Other federal law enforcement officers authorized to make warrantless arrests on probable cause include United States marshals (18 U.S.C. § 3053), Postal Service inspectors, [18 U.S.C. § 3061 (a) (3)], Federal Bureau of Investigation agents (18 U.S.C. § 3052, Secret Service agents (18 U.S.C. § 3056(a)), and Customs Service agents (26 U.S.C. § 7607).

** Reed's appellate brief attempts to dismiss *Watson* by claiming that the Court "upheld the validity of the defendant's warrantless, probable cause arrest in a public place, while specifically reserving the question of whether and under what circumstances an officer may enter a suspect's home to make a warrantless arrest," citing 423 U.S. at 418, n.6. (Reed Br. 25, n.). Appellate counsel fails to note that the very footnote which he cites goes on to discuss the American Law Institute's Model Code of Pre-arraignment Procedure, which "has addressed the question and recommended that an officer who is empowered to make an arrest and has probable cause to believe the person to be arrested is on private premises be authorized to demand entry to such premises and thereupon to enter to make an arrest." 423 U.S. at 418, n.6. Justice Marshall, in his dissenting opinion, took this footnote as suggesting that the Court would ultimately resolve the question in favor of permitting entries to effect arrests even in the absence of an arrest warrant. 423 U.S. at 454.

Having held in *Watson* that warrantless arrest in a public place was constitutional, in *United States v. Santana, supra*, the Supreme Court determined that an arrestee standing in the doorway of her home was in a public place. In that case a narcotics agent, having probable cause to arrest Santana, went to her house where he saw her in the doorway.* When the defendant saw the arresting officers approaching her, she fled into the house and was arrested in the vestibule. The Court found that since the defendant was first sighted in a public place in the doorway of her home, the "hot pursuit" into and apprehension in her home was proper, even without a warrant.

As the District Court determined, the reasoning and conclusion of *Santana* controls here. When Reed opened her door to the officers, who had knocked and properly identified themselves, she stood in a public place, under the holding of *Santana*, and could therefore be arrested even without a warrant. Although, unlike *Santana*, the record here does not clearly reflect the precise relationship of Reed to her doorway at the moment after she opened the door, it does not matter whether she stood precisely in the doorway or on the residential side of the threshold. As this Court and the Supreme Court have stated, the protections afforded by the Fourth Amendment are governed not by distinctions based on property law, but by reasonable expectations of privacy. *Katz v. United States*, 389 U.S. 347, 351-52 (1967); *Jones v. United States*, 362 U.S. 257, 266 (1960); *United States v. Galante*, 547 F.2d 733 (2d Cir. 1976). Once Reed voluntarily presented herself to the arresting officers

* The Supreme Court opinion variously refers to the exact spot where Santana was seen as the "doorway," 427 U.S. 42. In a footnote the locus was further delineated as "directly in the doorway—one step forward would have put her outside, one step backward would have put her in the vestibule of her residence." 427 U.S. at 40, n.1.

at the door of her apartment, she clearly had no expectation of privacy that would bar her arrest. In *Santana* the Supreme Court explicitly made this very point:

"While it may be true that under the common law of property the threshold of one's dwelling is 'private,' as is the yard surrounding the house, it is nonetheless clear that under the cases interpreting the Fourth Amendment *Santana* was in a 'public' place. She was not in an area where she had any expectation of privacy. 'What a person knowingly exposes to the public, even in his own house or office, is not a subject of Fourth Amendment protection.' *Katz v. United States*, 389 U.S. 347, 351 (1967). She was not merely visible to the public but was as exposed to the public view, speech, hearing, and touch as if she had been standing completely outside her house. *Hester v. United States*, 265 U.S. 57, 59 (1924). Thus, when the police, who concededly had probable cause to do so, sought to arrest her, they merely intended to perform a function which we have approved in *Watson*." 427 U.S. at 42.

In short, this Court need go no further than *Santana* to find that Reed's arrest occurred in a public place and, therefore, a warrant was not necessary. While Reed has attempted to turn her case into one that requires this Court to determine the constitutionality of a warrantless entry into a dwelling to effect an arrest, we submit that the question simply is not presented here. Accordingly, the District Court's decision should be affirmed on the authority of the very cases upon which it relied, *United States v. Watson*, *supra*, and *United States v. Santana*, *supra*.

C. Officers Empowered to Make Warrantless Arrests May Constitutionally Effect Them By Peacefully Attempting to Locate the Arrestee At Her Residence.

Even assuming *arguendo* that this Court should find that Reed did not put herself in a "public place" by opening the door to the officers—a position which we vigorously contend is correct—the arrest should still be held constitutional. Language in both the decisions of this Court and of the Supreme Court support such a result. Moreover, both logic and policy point to the same conclusion.

Before turning to precedent and policy, the issue must first be defined. Assuming that Reed was not in a public place when she opened her door, this case presents no more than the issue of a daytime warrantless arrest in non-exigent circumstances where the arrestee opens the door of her residence after officers have knocked and properly identified themselves. Under the facts as the District Court found them, the arrest was effected before the officers entered the dwelling. There was no effort to break down the door.* There was no ruse employed to cause Reed to open the door. The issue thus presented goes no further than these facts.

Beginning then with this Court's decisions, *Reed* relies heavily on *dicta* in two recent cases, *United States v. Jarvis*, 560 F.2d 494 (2d Cir. 1977) and *United States v. Berenguer*, Dkt. No. 77-1220, slip op. 6093 (2d Cir.,

* Reed argues that this was not a peaceful entry because "Agent Tuerack admitted that he had his hand on his weapon as he entered, and his weapon 'may have been visible' to Reed." (Reed Br. 31). However, this claim hardly turns this case into one of forcible entry. There was no evidence that the agents attempted to break down the door or even drew their guns. It is clear that the mild safety precaution taken by putting a hand on a gun upon effecting the arrest occurred after Reed had voluntarily opened the door.

Sept. 22, 1977) in which this Court expressed doubts about warrantless entries to effect arrests in private dwellings.* However, neither case presented facts like those involved here. *Jarvis* involved a warrantless arrest effected by breaking down the door of the arrestee's apartment. *Berenguer* involved an arrest effected when the defendant opened the door of his apartment, but the agent fraudulently induced him to do so by pretending to be a mailman or superintendent. Unlike *Jarvis* and *Berenguer*, both of which merely raised doubts and decided nothing on this issue, this case involves neither forcible entry nor use of a ruse.

Prior to *Jarvis* and *Berenguer*, opinions of this Court had suggested, if again only in *dicta*, that an arrest warrant would not be required to effect at least daytime, non-forcible arrests in dwellings. For example, in *United States v. DiStefano*, 555 F.2d 1094, 1100, n.5 (2d Cir. 1977), the Court in *dicta* characterized as "without merit" a claim that exigent circumstances were required to effect a warrantless arrest where agents, having probable cause, had proceeded to the defendant's house, knocked on the door, were admitted by the defendant or her child, and thereupon arrested the defendant. Similarly, in *United States v. Fernandez*, 480 F.2d 726, 740, n.20 (2d Cir. 1973), in *dicta*, this Court stated as follows:

* In *Jarvis* this Court expressed those doubts by stating that there is a "serious question whether the forcible entry into Jarvis' home without a valid warrant and in the absence of exigent circumstances meets the requirement of the statute of fourth amendment standards of reasonableness." 560 F.2d 498. Although Reed's Brief at 26-27 cites the last portion of this statement as the holding of *Jarvis*, appellate counsel informed us after his brief was filed that he did so without knowing that on October 19, 1977, upon the government's petition for rehearing, the Court's opinion was modified so that the use of the term "holding" was deleted from the opinion, and the terminology quoted above was substituted in its stead.

"Even if the arrest warrant was therefore invalid, none is required for a day-time arrest, even in a dwelling, which has been made on probable cause, especially when, as here, no force was used."

Moreover, in *United States v. Price*, 345 F.2d 256 (2d Cir.), *cert. denied*, 382 U.S. 949 (1965), this Court upheld an arrest effected by a nighttime entry into private premises stating that the officer had probable cause to arrest as he stood at the threshold of the apartment and that an officer with probable cause "may enter the defendant's premises in order to effectuate the arrest." 345 F.2d at 259. In *United States v. Mejias*, 552 F.2d 435, 444 (2d Cir. 1977), this Court also had no difficulty upholding a warrantless arrest where in effecting the arrest the officer knocked, and when entry was refused, broke into the premises.*

It is not surprising that such decisions and statements have been made by this Court since similar views have been expressed, again if only in *dictum*, by the United States Supreme Court. In *Miller v. United States*, 357 U.S. 301 (1958), the Supreme Court held that absent an announcement of authority and purpose, a non-exigent arrest could not be effected by breaking down a door. However, throughout its opinion the Court implicitly suggested that even force could be used to effect a warrantless arrest in a dwelling if the officers did announce their

* Although in *Berenguer*, slip op. 6099, n.5, *Mejias* was grouped with cases characterized as involving either consent or exigent circumstances, the *Mejias* opinion reveals neither to have been present. There was clearly no consent nor can exigent circumstances be found. Instead, the facts set forth in the opinion suggest that supervising law enforcement officers determined that their investigation had produced sufficient evidence and therefore they authorized a surveillance agent to arrest "if he saw fit." 552 F.2d at 443. When he decided to do so, no exigent circumstances had triggered that decision.

authority and purpose. 357 U.S. at 302-08. Although in *Johnson v. United States*, 333 U.S. 10, 15 (1948) the arrest was held invalid, the Court found the problem to be that the agents lacked probable cause to arrest when they entered the defendant's hotel room, again suggesting that had probable cause existed the entry would have been proper. As in *Miller*, exigent circumstance did not exist. See also *Sabbath v. United States*, 391 U.S. 585, 588 (1968); *Ker v. California*, 374 U.S. 23, 37-41 (1963). While the Supreme Court has described as unsettled the question of the constitutionality of warrantless arrests in private dwellings. *United States v. Watson*, *supra*; *Gestein v. Pugh*, 420 U.S. 103, 113, n. 13 (1975), doubts as to constitutionality have primarily been expressed about nighttime forcible entries, *Jones v. United States*, 357 U.S. 493, 499-500 (1958); *Coolidge v. New Hampshire*, 403 U.S. 443, 477 (1971). As a general matter, warrantless peaceful daytime arrests effected by entries into private dwellings represent well-established, commonly accepted practice in most jurisdictions.*

* In addition to approving entry into private dwellings to effect warrantless daytime arrests, the ALI Model Code of Pre-arraignment Procedure, §120.6 (1975) collects in its Appendix the statutes of 31 states authorizing entries to effect arrests without warrants and without a showing of exigent circumstances.

In relying on *Dorman v. United States*, 435 F.2d 385 (D.C. Cir. 1970) (*en banc*), Reed has gone far afield, since that case involved a nighttime entry into a private dwelling upheld on the basis of exigent circumstances. Most of the cases citing *Dorman* with approval have used its criteria as benchmarks for testing the presence of exigent circumstances sufficient to justify an entry into a dwelling to effect the arrest. *Salvador v. United States*, 505 F.2d 1348 (8th Cir. 1974) (arrest upheld where door opened "possibly" from force of knocking); *United States v. Shye*, 492 F.2d 886 (6th Cir. 1974) (arrest upheld where officers rushed in after door began to close); *Vance v. North Carolina*, 432 F.2d 984 (4th Cir. 1970) (arrest upheld where effected in defendant's rooming house); cf. *United States v. Phillips*, 497 F.2d 1131 (9th Cir. 1974) (arrest unlawful where officers used ruse to gain entry).

[Footnote continued on following page]

The prevalence of established law permitting entries into private dwellings to effect warrantless arrests suggests that sound logic and reasonable policy support the practice. Good law enforcement practices and the public safety dictate that arrests such as the one effected here be approved and encouraged rather than the contrary. Being empowered to make warrantless arrests, law enforcement officers can take no more reasonable action than to proceed to the defendant's known residence, knock on the door, identify themselves and effect the arrest when the arrestee presents herself at the door. Courts should not prefer to have officers wait in ambush on public streets or in public hallways, where the difficulties of effecting an arrest could create danger for innocent bystanders. Certainly, when as here, the arrestee's residence is known, officers who go there to effect the arrest are taking the most reasonable course available.*

We submit that in citing *Dorman* with approval, courts have too readily adopted criteria that may be useful for the limited purpose of evaluating the substantial intrusion of a nighttime entry, such as was present on the facts of that case. Reed's wooden application of the *Dorman* criteria to her own case demonstrates that they are least helpful in assessing the reasonableness of a minimally intrusive, peaceful, daytime arrest where the arrestee presents herself at her door in response to a knock and proper identification by the officers.

* Since we submit that the issue arguably raised in the context of this case must be resolved, if at all, in the Government's favor based upon the eminent reasonableness of the officers' actions here and the limited nature of the incursion into defendant's privacy interests, we need not unduly prolong this discussion with a broader defense of the propriety of warrantless arrests effected in private dwellings. Nevertheless, in the interest of preserving the point for more elaborate argument in perhaps another setting, we note in passing, an essential infirmity in the logic implicit in those cases which have expressed concern about warrantless arrests effected in private dwellings. Such cases have overlooked the fact that even if an arrest warrant were to

[Footnote continued on following page]

In conclusion, should this Court reach the question of the constitutionality of a warrantless arrest at the defendant's dwelling, we urge the Court to uphold the propriety of a daytime arrest effected by a knock on the door and proper identification. The essence of the Fourth Amendment is that the actions of the law enforcement officials be reasonable and the arrest contested here undoubtedly meets that basic requirement. It should therefore be upheld.

D. In Any Event, The Admission of the Telephone Books Could Be No More Than Harmless Error.

Finally, Reed's arguments about the lawfulness of her arrest could not serve to overturn her conviction, since the admission of the evidence seized in her apartment, the telephone books, could be no more than harmless error. This was a case where Reed sold one-eighth kilograms of heroin to an undercover agent, Hammonds, on three separate occasions. The purchase prices totalled almost \$20,000.

be obtained, that merely would serve as a guarantee that there was probable cause to arrest—a matter which is always subject to judicial review at a later time. However, an arrest warrant would not insure the reasonableness of entering a particular place to effect an arrest. There is no requirement in Rule 4 of the Federal Rules of Criminal Procedure that agents indicate where they expect to find an arrestee. Thus, a general requirement of an arrest warrant would add a formality that never would address the concern that the officer may make an unreasonable entry in effecting the arrest. Since it is the latter interest which principally is an issue under the Fourth Amendment, in the circumstances of an arrest within a dwelling, issuance of an arrest warrant simply is a misconceived panacea which, while directed at the wrong harm, creates an unnecessary and burdensome impediment to accomplishment of legitimate public and law enforcement interests. See *United States v. Watson*, 423 U.S. 411, 427-32 (Powell, J., concurring) and *United States v. Hall*, 348 F.2d 837, 841-42 (2d Cir. 1965).

In each instance she either personally accepted the money for the sale or handed over the heroin. The undercover agent testified to all this and a surveillance agent provided ample corroboration.* Reed's subsequent proposals for sales of first a kilogram and then a pound of high quality heroin were tape recorded and that devastating evidence was put before the jury. Finally, the Government also proved Reed's oral and written post-arrest admissions, in which she confessed that she sold the three-eighth kilograms of heroin and received part of the proceeds of the sales.

Indeed, in defense of herself, Reed conceded that she sold the heroin, but claimed that she had been entrapped. In advancing her entrapment defense, she fully admitted that she knew Al McCray, P.T., Paul Levy and James Crowley. As to Paul Levy, she claimed that McCray importuned her to obtain heroin from him. (Tr. 459, 466, 479-80, 513). As to Crowley, she admitted that he was a source of heroin, but asserted that any dealings with him resulted from entrapment. (Tr. 476-77, 498-99). Thus, the fact that the telephone books contained the names and numbers of these individuals did not upset Reed's defense. The strongest adverse inference which the Government gained from the telephone books was that Reed knew these individuals more intimately than she had admitted in her testimony.

The impact of the telephone books can be assessed from counsels' treatment of them in summation. The Government devoted four lines to this evidence in a 31-page initial summation. (Tr. 594) and merely mentioned them in passing again on rebuttal. (Tr. 627). In his summation, Reed's attorney found no need even to refer to this evidence. Thus, assuming this Court were to reach the constitutional issue which Reed raises about her arrest, it

* A second undercover agent, Rabb, testified to having previously been introduced to Reed as a person looking "to cop."

must ultimately conclude that the admission of the telephone books could have been no more than harmless error beyond a reasonable doubt. *Chapman v. California*, 386 U.S. 18 (1967); *United States v. Berenguer*, *supra*, slip op. at 6101.*

POINT II

Goldsmith's Statements Were Voluntary and Were Properly Obtained.

Goldsmith argues that statements he made to DEA agents and to the Assistant United States Attorney after his arrest were involuntary and should have been suppressed. He claims that he was concerned about his bail status and about his state parole being revoked and that in order to extract his statements the agents improperly manipulated that concern by falsely promising him assist-

* Without bothering to argue it in full, Goldsmith adopts Reed's contention that his arrest was unlawful, claiming that his post-arrest statements should therefore have been suppressed. (Goldsmith Br. 9). First, Goldsmith clearly waived the issue by failing to raise it pre-trial (Rule 12(f), Fed. R. Crim. P), and by failing to argue it at any point in the District Court. Second, having lawfully arrested Reed in a situation where she had to get dressed, it was perfectly proper to conduct a cursory examination of the premises to insure that third parties were not present in the apartment who might present a danger. See *United States v. Christophe*, 470 F.2d 865, 869 (2d Cir.), *cert. denied*, 411 U.S. 964 (1972); *United States v. Smith*, 515 F.2d 1028, 1031-32 (5th Cir. 1975) *cert. denied*, 424 U.S. 917 (1976); *United States v. Clemons*, 503 F.2d 486, 488 (8th Cir. 1974). Finally, under the holding of *United States v. Jarvis*, *supra*, even if the arrest had been unlawful, there would be no basis to suppress post-arrest statements which were as a result of the arrest, not the entry. Had the agents waited outside, the same evidence would ultimately have been obtained.

ance.* (Goldsmith Br. 9-11). The argument has neither factual nor legal support.

After Agent Bell arrested Reed at the doorway of her apartment, Agents Tuerack and Jordison proceeded to the bedroom where they found Goldsmith sleeping. They awakened him, placed him under arrest, and advised him of his constitutional rights. (Tr. 360-62, 401; H. 128). Apart from generalities, the agents did not question the defendants or enter into conversation with them while they were at Reed's apartment and in transit. (Tr. 240, 250, 364; H. 147-48).

The agents proceeded with Reed and Goldsmith to DEA Headquarters where they were processed, again advised of their constitutional rights, and interviewed separately. (Tr. 364-65). Each denied knowledge of why he had been arrested until Agent Hammonds appeared. (Tr. 253, 365-68; H. 111). Spontaneously and independently, each defendant then acknowledged participation in the three sales of eighth kilograms of heroin and agreed to consider cooperating with the agents in investigations of major narcotics suppliers. (Tr. 254-55, 367-70; H. 113-14). Goldsmith, however, refused to name his source for the first and third transactions. (Tr. 369).

Shortly thereafter, Reed and Goldsmith were taken to the United States Attorney's Office to prepare for

* At the pre-trial hearing, Goldsmith testified that he was groggy from lack of sleep, that he had been denied access to a lawyer after requesting to speak with one and that the agents had pointed guns at his head. (H. 166-69). That testimony however, was contradicted by Agent Hammonds who testified that Goldsmith appeared calm and "normal" at the time of his oral statements to the DEA agents. (H. 159-60). None of the agents heard Goldsmith ask for an attorney and Agents Bell and Tuerack each testified that they had not drawn their own guns. (H. 129; Tr. 241, 363, 394, 406). The grogginess and denial of counsel contentions have apparently been abandoned on appeal.

arraignment. (Tr. 370). After being advised of their constitutional rights by then Assistant United States Attorney Howard Sussman, each again admitted involvement in the heroin transactions and discussed cooperation. (Tr. 372, 381-83, 389-91). Their written statements—as recorded by the Assistant United States Attorney and signed by the defendants—were received in evidence. (Tr. 375, 386; GX 8-9).

When he was interviewed by the agents and by the Assistant United States Attorney, Goldsmith expressed great concern about his bail status and the likelihood of his New York State parole being revoked. That parole resulted from his 1967 conviction for felonious possession of a dangerous weapon, grand larceny in the first degree, robbery in the first degree and assault in first degree. (Tr. 385; H. 182-83). He was told that if he cooperated reasonable bail terms would be recommended to the U.S. Magistrate whose authority it was to set bail and that an effort would be made to contact New York State parole officers, but that the federal agents had little knowledge of the state's parole revocation practices. (Tr. 389-90; H. 111, 123-25, 130-31). At no time at the U.S. Attorney's Office or at DEA headquarters was he threatened or promised any results with regard to bail or parole. (Tr. 390-91; H. 149-50).

Goldsmith argues that his statements were involuntary because he was frightened and because he was led to believe that he would be released on bail and that his state parole would not be revoked when, in fact, the opposite occurred. However, the record clearly indicates that neither threats nor promises about bail or parole were ever made by the agents or by the Assistant United States Attorney. Furthermore, when the agents offered to contact Goldsmith's parole officer, it was in the context of enabling him to cooperate with their investigations of other narcotics traffickers, rather than as a reward

for the oral statement he had already given. (H. 124). Far from being frightened and confused, Goldsmith coolly refrained from identifying his source for the first and third transactions.

In *United States v. Ferrara*, 377 F.2d 16, 17 (2d Cir.), *cert. denied*, 389 U.S. 908 (1967) a federal agent told the defendant "if he cooperated with the United States [Attorney] I felt sure he would get out on reduced bail." This Court held that the comment was not the sort of promise that would make the confession involuntary. In *United States v. Pomares*, 499 F.2d 1220 (2d Cir.), *cert. denied*, 419 U.S. 1032 (1974) this Court rejected a similar challenge to a confession. The agents had urged the defendant to cooperate, stressing the benefits of cooperation and the severe penalties he would otherwise face. This Court approved their conduct, stating, "There was every reason for the agents to act as they did; their conduct did not violate the letter or the spirit of the holding of the Supreme Court in *Miranda*." 499 F.2d at 1222-23. The test of the voluntariness of a confession was set forth as follows:

"[W]hether an examination of all the circumstances discloses that the conduct of law enforcement officials was such as to overbear the defendant's will to resist and bring about confessions not freely self-determined."

499 F.2d at 1222. The cases cited by Goldsmith are in accord. *United States v. Dye*, 508 F.2d 1226 (6th Cir. 1974), *cert. denied*, 420 U.S. 974 (1975); *United States v. Arcediano*, 371 F. Supp. 457 (D. N.J. 1974).

Goldsmith began to admit his complicity in the heroin transactions immediately after he saw at DEA headquarters the undercover agent with whom he had dealt. Surely there was no improper coercion inherent in that

confrontation. There was no basis whatsoever for suppressing Goldsmith's statements and, accordingly, the District Court properly denied the motion to suppress.

POINT III

The Court Did Not Abuse Its Discretion In Ruling That Goldsmith's Prior Conviction Could Be Used To Impeach Him.

Goldsmith claims that Judge Bryan abused his discretion when he indicated during the pre-trial hearing that his prior conviction could be used for impeachment. He maintains that (1) the prior conviction was too remote in time, (2) the conviction was for an assaultive crime that had nothing to do with veracity and (3) Judge Bryan did not make the explicit findings on admissibility. (Goldsmith Br. 12-14). These arguments fail to acknowledge that Judge Bryan correctly applied Rule 609 of the Federal Rules of Evidence, and that, in any event, in obtaining that ruling from the District Court, Goldsmith failed to make a sufficient record to require review by this Court.

Goldsmith was convicted on November, 1967, of grand larceny in the first degree and felonious possession of a dangerous weapon. He had been sentenced to a total of twenty-nine years' imprisonment and was released on parole on September 2, 1974, after serving eight years and four months. Trial commenced on June 8, 1977.

In contesting Judge Bryan's decision to permit impeachment by this conviction, Goldsmith first takes issue with that portion of Rule 609(b) which permits impeachment by prior convictions within ten years of the release

from confinement.* However, according to Weinstein and Berger, "[t]he reason for measuring the period of time from the witness' release is obvious: until he has been at large for a number of years it is impossible to tell whether an ex-convict has reformed or merely lacked opportunity to commit another crime." See 3 J. Weinstein and D. Berger, *Evidence*, ¶ 609[03] at 609-70 (1976). *Gass v. United States*, 416 F.2d 767 (D.C. Cir. 1969). Here there were only three years between the release from confinement and the trial. Under the terms of Rule 609(b), the District Court's ruling was obviously correct. In any event, the date of the prior conviction was also within the ten year period and, accordingly, Goldsmith's argument has no force whatsoever.

Goldsmith next contends that there was an insufficient showing that his prior conviction bore on his credibility. At the outset, this claim need not even be considered since it was never made to the District Court. *United States v. Perez*, *supra*; *United States v. Fuentes*, *supra*; *United States v. Braunig*, *supra*. However, even on the merits, the claim is without substance. It is clear that a close connection between the prior conviction and credibility is necessary only when automatic admissibility is sought

* Rule 609(b) of the Federal Rules of Evidence Provides:

"(b) *Time Limit* . . . Evidence of a conviction under this rule is not admissible if a period of more than ten years has elapsed since the date of the conviction or of the release of the witness from the confinement imposed for that conviction, whichever is the later date, unless the court determines, in the interests of justice, that the probative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect. However, evidence of a conviction more than 10 years old as calculated herein, is not admissible unless the proponent gives to the adverse party sufficient advance written notice of intent to use such evidence to provide the adverse party with a fair opportunity to contest the use of such evidence."

pursuant to Rule 609(a)(2).^{*} *United States v. Hawley*, 554 F.2d 50 (2d Cir. 1977); *United States v. Hayes*, 553 F.2d 824 (2d Cir. 1977). When, as here, the proposed use of the prior conviction is based upon Rule 609(a)(1), a less direct bearing on veracity will suffice and is only one of several factors that may be considered by the court in weighing the probative value of the conviction against the prejudice to the defendant. *United States v. Hawley, supra*; *United States v. Hayes, supra*.

Goldsmith was convicted of grand larceny and burglary as well as assault and possession of a weapon. In *United States v. Hawley, supra*, the defendant's prior conviction for attempted burglary was admitted for impeachment purposes, despite the fact that he was on trial for a similar crime; the degree of prejudice was accordingly greater than in this case. In *Gordon v. United States*, 383 F.2d 936 (D.C. Cir. 1967), *cert. denied*, 390 U.S. 1029 (1968) Judge (now Chief Justice) Burger set forth general standards for relating convictions to credibility as follows:

"In common human experience acts of deceit, fraud, cheating, or stealing, for example, are universally regarded as conduct which reflects adversely on a man's honesty and integrity. Acts of violence on the other hand, which may result from a short temper, a combative nature, extreme provocation, or other causes, generally have little or no direct bearing on honesty and veracity." 383 F.2d 940.

^{*} Rule 609(a) of the Federal Rules of Evidence provides: "for the purposes of attacking the credibility of a witness, evidence that he has been convicted of a crime shall be admitted if elicited from him or established by public record during cross-examination but only if the crime (1) was punishable by death or imprisonment in excess of one year under the law under which he was convicted, and the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the defendant, or (2) involved dishonesty or false statement, regardless of the punishment."

Larceny and burglary, of course, are forms of stealing. In asserting that his conviction was of an assaultive nature and not relevant for impeachment, Goldsmith would have this Court ignore the fact he was convicted of crimes of stealing as well as of assault. Moreover, it is clear that Judge Bryan's decision to permit impeachment with the prior conviction was entirely reasonable in light of counsels' insistence that Reed and Goldsmith had been entrapped by the missing confidential informant. *United States v. Apuzzo*, 555 F.2d 306 (2d Cir. 1977).

Finally, with respect to Goldsmith's complaint as to the sufficiency of the District Court's ruling, it should be noted that Goldsmith's counsel merely inquired during the pre-trial hearing whether his prior conviction could be used to impeach him. (H. 20-21). Council did not place any facts before the court to explain the circumstances of the conviction, nor did she make any arguments asking the court to weigh the probative value against the prejudice that might result. Indeed, at no time did she even state that Goldsmith intended to testify in his own behalf.

Under those circumstances, Goldsmith can hardly complain that Judge Bryan did not make explicit findings as to the factors on which he based his decision to permit impeachment use of the conviction. Since Goldsmith made no showing as to what he would have testified about or, indeed, that he would have testified but for the court's ruling, he never truly invoked the court's discretion. In *United States v. Costa*, 425 F.2d 950 (2d Cir. 1969), *cert. denied*, 398 U.S. 938 (1970), in a similar context Judge Friendly stated:

Even more important, there was no offer of proof with respect to Costa's testimony sufficient for the Judge to compare the relevance of the prior conviction to credibility with the importance to Costa's defense of having him testify free from the prejudice which might be created by reference to it. Without this there is no meaningful invocation of judicial discretion. 425 F.2d at 954.

See also *United States v. Ortiz*, 553 F.2d 782, 785 (2d Cir. 1977).

POINT IV

The Court's Charge Concerning The Voluntariness of Goldsmith's Statement Was Entirely Proper.

Goldsmith argues that the District Court did not adequately instruct the jury to consider the voluntariness of his confession. However, the court charged the jury "to consider such statements and give them such weight as you believe they deserve after considering all the circumstances surrounding them which were brought out by both sides." (Tr. 649). This charge conformed to the statutory language,* as mandated by *United States v. Barry*, 518 F.2d 342 (2d Cir. 1975). As such, it was entirely correct.**

* 18 U.S.C. § 3501 (a) provides in pertinent part:

"If the trial judge determines that the confession was voluntarily made, it shall be admitted in evidence and the trial judge shall permit the jury to hear relevant evidence on the issue of voluntariness and shall instruct the jury to give such weight to the confession as the jury feels it deserves under all the circumstances."

** In this case it was apparent that the jury comprehended the instruction and deliberated on the issue of voluntariness. Shortly after retiring to consider its verdict, the jury requested and received, among other things, the advice of rights cards which had been admitted into evidence. (Tr. 678, 685, 691).

CONCLUSION

The judgments of conviction should be affirmed.

Respectfully submitted,

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